SEYNATH UMMA

v.

RAJABDEEN

SUPREME COURT.
G. P. S. DE SILVA, C.J.,
KULATUNGA, J. AND
RAMANATHAN, J.
S.C. APPEAL NO. 129/94.
C.A. NO. 333/86 (F).
D.C. NEGOMBO NO. 3074/L.
JULY 31, 1995.

Civil Procedure Code – Vacation of ex parte Decree – Section 86(2) of the Code – Misdirections of fact and law by the trial judge.

Held:

In rejecting the medical certificate produced by the defendant in support of her application to vacate the *ex parte* judgment and decree, the trial judge misdirected himself on the law when he faulted the defendant for failing to come into court and produce the medical certificate prior to the date fixed for the *ex parte* trial. In terms of section 82(2) of the Civil Procedure Code, the defendant could not have come into court prior to the entering of the judgment against her for default.

APPEAL from judgment of the Court of Appeal.

M. I. Q. M. Gazzali with *Ms. S. M. Senaratne* for defendant-appellant.

M. Y. M. Faiz for plaintiff-respondent.

Cur. adv. vult.

July 31, 1995.
G. P. S. DE SILVA, C.J.

The plaintiff instituted these proceedings in the District Court for the ejectment of the defendant from the land described in the schedule to the plaint. The plaintiff pleaded that the defendant's occupation of the land was with his leave and licence. In her answer, the defendant denied the plaintiff's claim.

The first date on which the case was taken up for hearing was 2.1.85. On that date issues were framed and the case was

postponed for further trial on 1.4.85. The defendant was absent and the registered Attorney-at-Law for the defendant informed the court that he had no instructions. Thereupon the court fixed the case for *ex parte* trial on 21.6.85. On 21.6.85 judgment was entered against the defendant for default and a copy of the decree was served on the defendant on 5.9.85. On 19.9.85 the defendant made an application to set aside the judgment and decree entered against her for default, pleading that she was unwell and hence was unable to attend court on 1.4.85. The District Court, however, refused to set aside the judgment entered upon default. Against this order, the defendant appealed unsuccessfully to the Court of Appeal. The defendant has now preferred an appeal to this Court.

The defendant was a woman of 75 years of age. Prior to 2.1.85 the case had been fixed for trial on no less than four dates and on all those dates the defendant had been present in court. Moreover, on 3.2.84 the defendant had filed her list of witnesses and documents. On 21.5.84 an additional list of witnesses and documents was filed by the defendant.

It was the position of the defendant, at the inquiry before the District Court, that she could not attend court on 1.4.85 because she was unwell. In support of her case, she produced a medical certificate and also called as a witness the medical practitioner who had issued the medical certificate. The medical certificate is dated 27.3.85 and states that the defendant "is under treatment for hypertension." The medical certificate further states "I recommend her ten days bed rest from 27th March 1985. She is not fit to attend courts on 1st April 1985." It is right to add that at the hearing before us Mr. Faiz for the plaintiff-respondent very properly did not challenge the medical certificate, though counsel strenuously contended that the District Court and the Court of Appeal had correctly rejected the evidence of the defendant that she was unfit to attend court on 1.4.85.

On the other hand, Mr. Gazzali for the defendant-appellant, contended that the District Court had misdirected itself both on the facts and on the law. Turning first to the facts, the District Judge in his order states that he cannot accept the position that the defendant received treatment on 1.4.85, the reason being that the doctor did not maintain any document in proof of that assertion. This statement is

clearly contrary to the evidence on record. The doctor's evidence was that he examined the defendant on 27.3.85 and **not** on 1.4.85; nor was it the claim of the defendant that she took treatment on 1.4.85. Again, the District Judge rejects the defendant's evidence that she was unable to submit the medical certificate to court on 1.4.85, notwithstanding the defendant's uncontradicted evidence that none of her children were available to have the medical certificate sent to court on that date.

What is even more serious is the error of law apparent on a reading of the order. The District Judge held that the failure of the defendant to come into court and produce the medical certificate prior to the date fixed for the *ex parte* trial (21.6.85), showed a lack of diligence on her part. In so holding, the District Judge has clearly overlooked the provisions of the Civil Procedure Code (Amendment) Act, No. 53 of 1980 whereby section 86(1) of the Civil Procedure Code was repealed. It was the **repealed** section 86(1) which enabled a defendant to come into court "... at any time **prior** to the entering of judgment against him for default ..." with the repeal of section 86(1), the defendant could not have come into court prior to the entering of judgment against him for default. The stage at which the defendant could have come into court is set out in section 86(2). And it was precisely in terms of section 86(2) that the defendant made the application. Moreover, the misreading of section 86 of the Civil Procedure Code influenced the District Judge's evaluation of the oral testimony.

The Court of Appeal in affirming the Order of the District Court failed to address itself to the infirmities in that order both on the facts and on the law, adverted to above.

For these reasons, the appeal is allowed and the judgment of the Court of Appeal and the order and decree of the District Court are set aside. The District Court is directed to permit the defendant to proceed with her defence as from the stage of default. The plaintiff must pay a sum of Rs. 500/- to the defendant as costs of appeal.

KULATUNGA, J. – I agree.

RAMANATHAN, J. – I agree.

Appeal allowed